# Ng Chuan Hock v Tan Sri Musa bin Dato' Hj Hassan (Inspector-General of Police and Chairman of the Disciplinary Authority, Royal Malaysian Police) & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01–119–11 OF 2011

MOHD HISHAMUDIN, SYED AHMAD HELMY AND ZAWAWI SALLEH JJCA

14 MARCH 2013

*Administrative Law — Judicial review — Application for — First respondent's decision to dismiss appellant from police force — Rules of natural justice — Breach of — Investigation Committee asked appellant to leave the room when his witness was giving evidence — Whether appellant's absence when his witness was giving evidence amounted to breach of the rules of natural justice — Certiorari — Whether order of certiorari ought to be issued to quash decision of first respondent*

On 13 July 2005, the appellant, a Chief Inspector in the Royal Malaysian Police, had been issued with a show cause letter that notified him of a disciplinary proceeding against him in respect of the nine charges preferred against him. Although the appellant had been given 21 days to submit a written representation, he applied for and obtained an extension of time to submit his written representation with access to certain documents to enable him to make the representation. The Disciplinary Authority ('the first respondent') decided that an Investigation Committee ('the IC') would be set up under reg 37(5) of the Public Officers (Conduct and Discipline) Regulations 1993 for the purpose of obtaining further clarification on the case against the appellant. During the proceeding before the IC, the appellant had called a witness to give evidence on his behalf. However, the IC had asked the appellant to leave the room when his witness was giving evidence. Upon concluding its inquiry, the IC prepared and submitted a report to the first respondent for the latter's consideration. After having taken into consideration the appellant's representation and the report of the IC, the first respondent found the appellant guilty of three of the charges brought against him and made a decision to dismiss him from the police force. The appellant applied to the High Court for judicial review of the first respondent's decision. The High Court judge found that the appellant's absence during the time his witness was testifying was not fatal and could not vitiate the finding of the first respondent because the appellant had been given sufficient opportunity to present his case. Consequently the appellant's application was dismissed. This was the appellant's appeal against that decision. The appellant contended that there was

a breach of the rules of natural justice when he was asked to leave the room at the time when his witness was giving evidence before the IC.

**Held**, allowing the appeal with costs:
There was a serious breach of the rules of natural justice when the appellant, for no apparent reason, was asked to leave the room, when his own witness was giving evidence before the IC. Asking the appellant to leave the room amounted to the IC hearing evidence and cross-examining the appellant's witness behind the back of the appellant. In addition, there was the further injustice of the appellant being deprived of the opportunity to re-examine his own witness. In the circumstances, the High Court order was set aside and an order for certiorari was issued to quash the decision of the first respondent (see paras 24–26).

**[Bahasa Malaysia summary**

Pada 13 Julai 2005, perayu, Ketua Inspektor di dalam Polis DiRaja Malaysia, telah diserahkan dengan surat tunjuk sebab yang memberitahunya mengenai prosiding tatatertib terhadapnya berkaitan sembilan tuduhan yang dikenakan terhadapnya. Walaupun perayu diberi masa 21 hari untuk menyerahkan representasi bertulis, beliau memohon dan memperolehi lanjutan masa untuk menyerahkan representasi bertulisnya dengan akses kepada dokumen-dokumen tertentu untuk membolehkannya membuat representasi. Pihak Berkuasa Tatatertib (responden pertama) memutuskan bahawa Jawatankuasa Siasatan ('JS') akan ditubuhkan di bawah peraturan 37(5) Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 bagi tujuan untuk mendapatkan penjelasan selanjutnya atas kes terhadap perayu. Semasa prosiding di hadapan JS, perayu telah memanggil saksi untuk memberi keterangan bagi pihaknya. Walau bagaimanapun, JS telah menyuruh perayu meninggalkan bilik apabila saksinya memberi keterangan. Setelah menyimpulkan siasatannya, JS menyediakan dan menyerahkan laporan kepada responden pertama untuk pertimbangan beliau. Selepas mengambil pertimbangan representasi perayu dan laporan JS, responden pertama mendapati perayu bersalah terhadap tiga tuduhan yang dikenakan terhadapnya dan membuat keputusan untuk memecat perayu daripada pasukan polis. Perayu memohon kepada Mahkamah Tinggi untuk semakan kehakiman terhadap keputusan responden pertama. Hakim Mahkamah Tinggi mendapati bahawa ketiadaan perayu semasa saksinya memberi keterangan tidak menjejaskan dan tidak dapat melemahkan dapatan responden pertama kerana perayu telah diberi peluang yang mencukupi untuk membentangkan kesnya. Akibatnya, permohonan perayu ditolak. Ini adalah rayuan perayu terhadap keputusan tersebut. Perayu berhujah bahawa terdapat kemungkiran peraturan keadilan asasi apabila beliau disuruh keluar dari bilik pada masa saksinya memberi keterangan di hadapan JS.

**Diputuskan,** membenarkan rayuan dengan kos:

Terdapat kemungkiran peraturan keadilan asasi yang serius apabila perayu, tanpa alasan yang jelas, disuruh meninggalkan bilik tersebut, apabila saksinya sendiri memberi keterangan di hadapan JS. Meminta perayu meninggalkan bilik tersebut merupakan seperti JS mendengar keterangan dan pemeriksaan balas di belakang perayu. Tambahannya, terdapat ketidakadilan lanjut terhadap perayu yang dinafikan dengan peluang untuk memeriksa balas semula saksinya sendiri. Dalam keadaan ini, perintah Mahkamah Tinggi diketepikan dan perintah untuk certiorari dikeluarkan bagi membatalkan keputusan responden pertama (lihat perenggan 24–26).]

**Notes**

For cases on application for judicial review, see 1(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 278–320.

**Cases referred to**

*B Surinder Singh Kanda v The Government of the Federation of Malaya* [1962] 1 MLJ 169, PC (refd)

*Fauzilah binti Salleh v Universiti Malaysia Terengganu* [2012] 2 AMR 303, HC (refd)

*Ganasan a/l Marimuthu v Public Services Commission & Anor* [1998] 4 MLJ 280; [1998] 4 CLJ 331, CA (refd)

*Ghazi bin Mohd Sawi v Mohd Haniff bin Omar, Ketua Polis Negara, Malaysia & Anor* [1994] 2 MLJ 114; [1994] 2 CLJ 333, SC (refd)

*Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi a/l K Perumal* [2001] 2 MLJ 417; [2001] 2 CLJ 525, FC (refd)

**Legislation referred to**

Public Officers (Conduct and Discipline) Regulations 1993 regs 37, 37(5), 37B(3), Part V

**Appeal from:** Civil Suit No R2–405 of 2010 (High Court, Kuala Lumpur)

*Karpal Singh (Sangeet Kaur Deo with him) (Karpal Singh & Co) for the appellant.*
*Suzana bt Atan (Senior Federal Counsel, Attorney General's Chambers) for the respondents.*

**Mohd Hishamudin JCA (delivering judgment of the court):**

**[1]** This is an appeal against the decision of the learned High Court judge of Kuala Lumpur made on 28 January 2011.

**[2]** At the High Court, the appellant ('Ng Chuan Hock') applied (by way of judicial review) for an order of certiorari to quash the decision of the second

respondent ('the Disciplinary Authority of the Royal Malaysian Police') dismissing him from the police force after finding him guilty of three disciplinary charges.

**[3]** The learned High Court judge had dismissed the appellant's judicial review application.

**[4]** We had allowed the appeal. We shall now give our grounds.

FACTS OF THE CASE

**[5]** Briefly, the facts are as follows. At the material time, the appellant was a chief inspector in the Royal Malaysia Police, stationed at the Police Headquarters, District of Yan, Kedah.

**[6]** By a letter of 13 July 2005, the appellant was notified by the inspector-general of police of a disciplinary proceeding against him under the Public Officers (Conduct and Discipline) Regulations 1993 ('the 1993 Regulations'): there were nine charges against him. He was given 21 days to submit a written representation.

**[7]** By a letter of 9 August 2005, the appellant applied for an extension of time to submit his written representation. The appellant also applied to be supplied with certain documents to enable him to make his representation. The inspector-general acceded to these requests.

**[8]** The appellant submitted his written representation to the disciplinary authority via his letter dated 11 March 2007.

**[9]** The disciplinary proceeding was carried out under the provisions of the 1993 Regulations. Part V of the 1993 Regulations sets out the procedure pertaining to the disciplinary proceeding against public officers.

**[10]** Sub-regulation (5) of reg 37 provides that if the disciplinary authority considers that a case against an officer requires further clarification, it may establish an Investigation Committee for the purpose of obtaining such further clarification. The procedure to be followed by the Investigation Committee is provided for under reg 37B of the 1993 Regulations.

**[11]** Sub-regulation (3) of reg 37B provides that if witnesses are called and examined by the Investigation Committee, the officer should be allowed to be present and to cross-examine the witnesses. The exact wording of reg 37B (3) of the 1993 Regulations is as follows:

(3) If witnesses are called and examined by the Investigation Committee, the officer shall be given an opportunity to be present and to cross-examine the witnesses on his own behalf.

**[12]** The disciplinary authority met on 20 June 2007 and deliberated on the appellant's case. It decided that an Investigation Committee be set up under reg 37(5) of the 1993 Regulations for the purpose of obtaining further clarification.

**[13]** The Investigation Committee sat on 22–23 April 2008. What had happened was that, during the proceeding before the committee, when the time came for the appellant to call his witness to give evidence before the committee, the appellant was asked by the committee to leave the room. Thus the appellant's witness gave evidence in the absence of the appellant. However, no explanation was given by the Investigation Committee as to why the appellant was asked to leave the room.

**[14]** Be that as it may, the Investigation Committee, after having concluded its inquiry, prepared and submitted a report to the disciplinary authority for the latter's consideration.

**[15]** By a letter dated 3 June 2010, the appellant was informed by the chairman of the disciplinary authority (the first respondent) that, after having considered the appellant's representation and the report of the Investigation Committee, the disciplinary authority arrived at a decision finding him guilty on three of the charges; and that the disciplinary authority further made a decision to dismiss him from the police force in relation to the first and third charges; and to issue him with a mere warning in respect of the ninth charge.

**[16]** Aggrieved by the decision of the disciplinary authority, the appellant applied to the High Court for judicial review. The application was dismissed.

DECISION OF THE HIGH COURT

**[17]** In dismissing the appellant's judicial review application, the learned High Court judge, in her grounds of judgment, said:

10. In the present case reg 37 contemplates that the officer will not cross-examine his own witness. However, he has been given all the opportunities to represent his case at the hearing. From the facts of the present case the applicant had after been issued with a show cause letter on 13 July 2005 was granted two months at his own request, to make his representation. Upon the retirement of Tan Sri Mohd Bakri Bin Hj Omar as the IGP, the first respondent took over the matter and had given opportunity to the applicant to check through all the required documents for him to

present his case. He was in fact told to go to Pejabat Urus setia Ketua Polis Negara (tatatertib) to inspect documents, which he did on 6 February 2007. He was asked to make an additional or fresh representation within 21 days. He instead sought an extension of another ten days and finally delivered his representation on 11 March 2007. Pursuant to reg 37(5), the Lembaga Tatatertib deliberated and decided to form a *jawatankuasa penyiasat*, to allow the appellant further evidence. The *jawatankuasa penyiasat* which was supposed to deliberate on 8 April 2008 was again postponed to 9 April 2008 at the request of the applicant due to some problems with his witness. Given the conduct of the proceeding on the whole (see exh TSMH10) it is clear that the applicant was afforded ample opportunity to present his case. Thus to my mind his absence during the time his own witness testifying is not fatal and cannot vitiate the finding of the disciplinary authority.

11. The rule of natural justice requires that an adjudicatory body should not make a decision adverse to a person without affording him effective opportunity or adequate opportunity of presenting his case. It is not a replica of the court procedure. In *Lim Ko & Anor v Board of Architects* [1966] 2 MLJ 80 the point was stressed that the court should look closely at the form and not the substance and must not be looked at as if it is the proceeding of a court. Having had all these tests in my mind and applying them to the present case I am of the view that there is no breach of the rule of natural justice by the *Lembaga Tatatertib* here as the facts disclose that the appellant had been given sufficient opportunity to present his case. In fact in *Najar Singh v Government of Malaysia & Anor* [1976] 1 MLJ 203, the Privy Council had rejected a plea for an oral hearing under art 135(2) of the Federal Constitution to be a denial of natural justice. Comparing it to the present case the applicant had been given all the opportunities and even oral hearing and the right to cross-examine witnesses called by the authority.

THE ISSUE

**[18]** The issue for us to consider in this appeal is whether there was a breach of the rules of natural justice when the appellant was asked to leave the room when the Investigation Committee was hearing the evidence of the appellant's witness.

SUBMISSION OF THE APPELLANT

**[19]** In the present case, the contention of the appellant is that there was a breach of the rules of natural justice when he was asked to leave the room at the time when his witness (the witness whom he himself brought before the Investigation Committee) was giving evidence before the Investigation Committee. Learned counsel for the appellant, Mr Karpal Singh, submitted:

We respectfully state our abovementioned submission should find favour with this Court. Clearly evidence was taken behind the back of the appellant in clear violation of the audi alteram partem principle.

**[20]** Learned counsel referred to:

(a) *Fauzilah binti Salleh v Universiti Malaysia Terengganu* [2012] 2 AMR 303; and

(b) *B Surinder Singh Kanda v The Government of the Federation of Malaya* [1962] 1 MLJ 169.

**[21]** In the Privy Council case of *Surinder Singh Kanda*, it was held (at pp 172–173):

> If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them. This appears in all the cases from the celebrated judgment of Lord Loreburn LC in *Board of Education v Rice* down to the decision of Their Lordships' Board in *Ceylon University v Fernando*. It follows, of course, that the judge or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other. The court will not enquire whether the evidence or representations did work to his prejudice. Sufficient that they might do so. The court will not go into the likelihood of prejudice. The risk of it is enough.

SUBMISSION OF THE RESPONDENTS

**[22]** Ms Suzana Atan, learned senior federal counsel, for the respondents, submitted that the learned High Court judge was legally right when she decided that reg 37 contemplates that the officer will not cross-examine his own witness. Learned senior federal counsel argued:

> We humbly submit that the appellant's absence during the time his own witness testified is not fatal and did not vitiate the finding of the disciplinary authority As the witness is for or produced by the appellant to support his case, there is no issue of the appellant not being given the opportunity to cross-examine his witness as provided under sub-regulation 37B (3) of Regulations 1993. The appellant is not in any way prejudiced.

**[23]** Learned senior federal counsel referred to the following cases:

(a) *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi a/l K Perumal* [2001] 2 MLJ 417; [2001] 2 CLJ 525;

(b) *Ganasan a/l Marimuthu v Public Services Commission & Anor* [1998] 4 MLJ 280; [1998] 4 CLJ 331; and

(c) *Ghazi bin Mohd Sawi v Mohd Haniff bin Omar, Ketua Polis Negara, Malaysia & Anor* [1994] 2 MLJ 114; [1994] 2 CLJ 333.

DECISION OF THIS COURT

**[24]** In our judgment, with respect, we accept Mr Karpal Singh's submission that there was a serious breach of the rules of natural justice when the appellant, for no apparent reason, was asked to leave the room (where the inquiry by the Investigation Committee was held) when his own witness was giving evidence. The appellant, therefore, had no knowledge what evidence was given by his own witness to the Investigation Committee. He also had no knowledge as to what were the questions that were put to his witness by the officer conducting the inquiry before the Investigation Committee during cross-examination. And he had no opportunity to re-examine his own witnesses.

**[25]** In our judgment, by asking the appellant to leave the room, the Investigation Committee was hearing evidence 'behind the back' (to borrow the words used by the Privy Council in *Surinder Singh Kanda*) of the appellant. It is true that at the point of time when the appellant was asked to leave the room it is the appellant's own witness that was giving evidence, and not the complainant's witness. But as we see it, still, it is a case of hearing evidence and cross-examining the appellant's witness behind the back of the appellant. And there was the further injustice when the appellant was deprived of the opportunity to re-examine his own witness. It is elementary justice that the appellant must be present during the inquiry when his own witness was giving evidence.

**[26]** We, therefore, allowed the appellant's application for judicial review as per prayers (a)–(b), (d)–(f) and (h). The order of the High Court is set aside. An order for certiorari to issue to quash the decision of the disciplinary authority.

**[27]** Appeal allowed with cost.

*Appeal allowed with costs.*

Reported by Kohila Nesan